No. 94-994

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

DENARD M. FOBBS, M.D.,

Petitioner,

vs.

HOLY CROSS HEALTH SYSTEM CORPORATION, a California Corporation, doing business as SAINT AGNES HOSPITAL AND MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM, M.D.; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; and LARRY E. NIX, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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Petitioner filed his petition for writ of certiorari on December 1, 1994, and the respondents have filed their brief in opposition to said petition. Petitioner hereby submits the following reply to respondents' brief in opposition.

The Ninth Circuit's erroneous use of summary judgment to deprive petitioner of his Fifth Amendment right to a trial presents viable and important grounds for granting certiorari. The courts and counsel should be clearly apprised of the date of accrual of a right of action based upon a decision made by an administrative body. The date of accrual should be when the decision has actually, finally been made, and a litigant should not have to guess about that date.

The decision of the Ninth Circuit upholding summary judgment based upon the Health Care Quality Improvement Act of 1986 similarly presents important grounds for certiorari. The immunity provisions of the Health Care Quality Improvement Act of 1986 have not been given a definitive interpretation. There is considerable doubt among the bench and bar concerning when, and to what proceedings, those immunity provisions apply.

The Ninth Circuit opinion in the instant case has sown the seeds of confusion. With its vague standard that summary privilege restrictions may be imposed without due process so long as there is a possibility of future medical harm, the Ninth Circuit has given hospitals and bureaucratic administrative committees an opportunity to summarily suspend physicians whenever desired. Virtually any medical procedure — from a tonsillectomy to the prescription of medication — may potentially give rise to future harm. Similarly, the Ninth Circuit has created confusion concerning the proceedings to which Health Care Quality Improvement Act standards apply.

PETITIONER'S REPLY TO RESPONDENTS' "STATEMENT OF CASE"

While respondents accuse — without citation — petitioner of omitting or misstating material facts, respondents allude only to *petitioner's* appendix presented in support of this petition for writ of certiorari. Respondents' accusations are not supported by any documents suggesting the omission or misstatement of material facts by petitioner.

Furthermore, it is respondents who are guilty of misstating and distorting facts. Thus, respondents suggest at page three of "Respondents' Brief in Opposition" that Dr. Ostergard criticized the three cases of petitioner which were referred to Dr. Ostergard for review. That is not correct. As the trial judge acknowledged in one of his opinions:

> Dr. Ostergard's report is interpreted differently by plaintiff and defendants. Defendants assert that Dr. Ostergard was critical of plaintiff's management of the cases which were submitted for his review, while plaintiff asserts that Dr. Ostergard was primarily critical of the hospital. Both assertions are true to an extent.

(Appendix, p. 29a).

Furthermore, the trial judge acknowledged that he was concerned by the fact:

> . . . that defendants decided to continue the monitoring system despite the fact that Dr. Ostergard concluded that plaintiff had provided adequate care in two of the three original cases and that, with regard to the

> third case, two other doctors agreed that plaintiff's actions therein were reasonable[14].

(Appendix, p. 69a).

> In a footnote, the court further acknowledged:
>
> 14. The court's concern is somewhat intensified by the fact that numerous other submissions by plaintiff reflect that other outside evaluators believe that his handling of the eight cases on contention was generally adequate.

(Appendix, p. 60a, fn. 14).

The record therefore clearly indicates that Dr. Ostergard was not the critic of petitioner that respondents would portray. Dr. Ostergard and other physicians verified that petitioner's medical treatment was reasonable and appropriate.

FURTHER REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Erroneously Upheld Summary Judgment Based on a One-Year Statute of Limitations Where the Wrongful Act Was Not Complete Until Less Than One Year Prior to the Filing of the Underlying Complaint.

Respondents rely on *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), to argue that petitioner's cause of action accrued on August 29, 1988, the date that the MEC notified petitioner that it had summarily suspended his medical staff privileges. (Respondents' Brief in Opposition, pp. 6-7). Respondents attempt to analogize the instant case to *Delaware State College v. Ricks* wherein a college teacher was denied

tenure, that decision was finally communicated to the college teacher on the date of accrual, and thereafter the college teacher pursued grievance procedures. This Court held that the cause of action accrued upon the making and communication of the tenure decision. The *Ricks* scenario, however, is not present in the instant case.

Unlike *Ricks,* wherein a decision was finalized and the party thereafter pursued proceedings attacking the decision, when an administrative body acts to suspend hospital privileges of a physician in a hospital, the final decision is not made until all facets of the administrative body's procedure have concluded. (*See, e.g., Bollengier v. Doctors' Medical Center,* 222 Cal. App. 3d 1115, 1124-1127 (1990)). As the First Circuit has pointed out in *Johnson v. General Elec.,* 840 F.2d 132, 134-139 (1st Cir. 1988), the *Ricks* holding does not extend to situations wherein the action giving rise to the lawsuit is not final. In hospitals, *Bollengier* expressly holds that such decisions are not final until the administrative process runs out. Tenured decisions in universities — as in *Ricks* — may be final in some other fashion. The discussion in *Hoesterey v. City of Cathedral City,* 945 F.2d 317, 319-320 (9th Cir. 1991) also illustrates the inapplicability of *Ricks.* Like *Hoesterey,* petitioner in the instant case challenges the specific process and practices accompanying his suspension; in such a case, to trigger the statute of limitations, petitioner needed to have received notice not only of the summary suspension decision, but also that the decision was final and that it would be followed by no further process. That did not occur until, at the soonest, September 30, 1988.

It should also be observed that the position espoused by respondents is inherently inconsistent. On the one hand as to the Health Care Quality Improvement Act immunity issue, respondents claim immunity for all earlier acts during the administrative process on the theory that *at the end of the process* they provided a fair hearing. However, in seeking to invoke an

early statute of limitations date, respondents assert that actions before the conclusion of the process may be treated as independent. Respondents seek (and the Ninth Circuit has provided) the right to have their cake and eat it too.

Respondents misconceive the significance of the notion of "exhaustion of internal administrative remedies" in connection with the date of accrual of an administrative "act." As is clear in cases such as *Bollengier* and *Hoesterey,* there are instances — and this case is one — wherein the administrative act itself is not "final" until the process has finally concluded. The administrative procedure in *Ricks* was of a different nature. That procedure was not a "decision-making" procedure, but rather was a "grievance procedure."

Dr. Fobbs was a physician on the staff and entitled to the rights and privileges thereof unless and until an administrative process resulted in some final act terminating or suspending his membership. He was not an applicant who had been rejected who had the right afterward to invoke a grievance procedure challenging the action. Whether or not "exhaustion" would be a prerequisite to a federal civil rights action is a completely irrelevant consideration. The point is that the wrongful act was not accomplished *until* finally effectuated through conclusion of he administrative process.

II. The Ninth Circuit Erred in Upholding Summary Judgment Based Upon the Expiration of a One-Year Statute of Limitations Where the Petitioner Set Forth a Showing of Equitable Tolling.

Respondents' arguments fail to address the fact that *Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1275 (D.C. Cir. 1991) held that discrimination on the basis of race in the monitoring and supervision of a physician may give rise to a private cause of action under 41 U.S.C. § 1981, showing that the

claims by petitioner in his complaint to the Office of Civil Rights were *not* "separate and distinct" from his claims in this action. Further, respondents have not addressed their failure to raise, as required by *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986), the contention that the application of equitable tolling would be inconsistent with federal policy. It is only after the moving party raises a contention that the opposing party has the duty to show a genuine issue for trial. (*Id.* at p. 324).

Moreover, it does not require a lengthy evidentiary showing to justify the conclusion that federal policy favoring non-discriminatory practices would support the application of equitable tolling while a complaint is pending with the Office of Civil Rights. Such application would encourage immediate and prompt resort to the appropriate *federal* agency before the filing of a civil lawsuit. Obviously, federal policy is promoted by encouraging litigants to resolve their differences through federal administrative offices.

III. The Ninth Circuit Erred in Upholding Summary Judgment Premised on the Expiration of a One-Year Statute of Limitations Where the Petitioner Showed That the Respondents Made Representations to Petitioner, Relied Upon by Petitioner, That the Wrongful Act Would Not Be Complete Until a Time Within One Year of the Filing of the Underlying Complaint.

Respondents seek to avoid the effect of respondents' notices to petitioner that his summary suspension would not be final until September 30, 1988. Respondents — and the Ninth Circuit opinion — make the fatuous assertion that "Dr. Fobbs did not believe anything that the defendants wrote or said to him, and he certainly was not misled." (Respondents Brief in Opposition, p. 12; Appendix, p. 17a). While Dr. Fobbs perhaps had little confidence in the integrity of respondents, Dr. Fobbs was beyond doubt misled by the notices suggesting that the statute of

limitations would begin running on September 30, 1988. This fact is apparent merely from the date of filing of the underlying lawsuit — September 29, 1989 — *one day before the expiration of that one-year period.* (Appendix, p. 35a).

IV. The Ninth Circuit Erred in Upholding Summary Judgment Premised on the Expiration of a One-Year Statute of Limitations Where the Petitioner Showed a Continuing Violation of 42 U.S.C. § 1981, Such That the Last Discriminatory Act Occurred Within One Year of the Filing of the Underlying Complaint.

Respondents' argument and the trial court decision suggest that it would not be discriminatory to deny petitioner fair hearing conditions — a panel without direct competitors — merely because such denial was justified by invoking the hospital's bylaws. However, petitioner made it clear that the peer review process was utilized against him in a racially discriminatory fashion. The denial of a fair hearing panel at the end was one more discriminatory act. The allegation of a continuing course of intimidation, harassment and disparate treatment of an individual has been held to allege a continuing violation according to *Sosa v. Hiraoka*, 920 F.2d 1451, 1457-1458 (9th Cir. 1990).

V. The Ninth Circuit Erred in Upholding Summary Judgment Based Upon the Health Care Quality Improvement Act Where the Petitioner Produced Evidence of No Imminent Harm While the Respondents Failed to Produce Evidence of Imminent Harm, and Where the Ninth Circuit Based Its Decision on the Existence of a Mere "Possibility" of Harm Supporting a Summary Action.

Respondents attempt to minimize the bizarre standard created by the Ninth Circuit when it held in this case that the statute "does not require imminent danger to exist before a

summary restraint may be imposed." (Appendix, p. 9a). Respondents state that petitioner does not rely on "authority" in questioning the Ninth Circuit's interpretation. To the contrary, petitioner very clearly asserted that the Ninth Circuit's selection of a non-standard — the mere possibility of future harm — to allow summary privilege restrictions "effectively strips physicians of *all* due process protections." (Petitioner, p. 17). Petitioner's right to due process emanates from the Fifth Amendment of the United States Constitution. (Petition, p. 3). Presumably, the United States Constitution is still considered "authority" supporting a legal argument.

Respondents assert that petitioner's "fears are overblown" concerning the blank check given by the Ninth Circuit to suspend — without any hearing or due process — the privileges of physicians. That is easy for respondents to say. They are the *imposers* of summary suspensions, not the *recipients*. Literally *every* medical procedure has a potential for future danger. The Ninth Circuit has given carte blanche to respondents to violate the anti-trust laws with impunity.

VI. The Ninth Circuit Erred in Upholding Summary Judgment Based Upon the Health Care Quality Improvement Act Where the Petitioner Has Shown Deviation From the Health Care Quality Improvement Act Standards as to Peer Review Actions Prior to the Final Peer Review Action.

Respondents claim that so long as the final peer review action is appropriate, all prior misconduct should be immunized. Respondents assert that their "recognition of procedural defects, and the correction of them during the administrative appeal process," justify immunity. (Respondents' Brief in Opposition, p. 16, fn. 2). Respondents invoke the District Court's assertion that the standards are intended to apply to "discrete decisions, not to

an ongoing course of conduct." (Respondents' Brief in Opposition, p. 16, fn. 2).

The problem with respondent's analysis is that it would allow months and years of wrongful anti-competitive conduct with impunity whenever the respondents finally, at the end of that conduct, provided a proper hearing. It is not the "recognition of procedural defects and the correction of them" that results in loss of immunity. It is the *previous wrongful hearings* that are not immunized. Thus, petitioner may have no claim to damages based a final, proper hearing. He may be limited to the damages caused by the two previous improper hearings.

The trial court's "discrete decision" commentary — embraced by the Ninth Circuit and by respondents — affords no basis for immunizing respondents for intermediate "discrete decisions" which are wrongful in nature and have caused petitioner harm. The District Court, the Ninth Circuit, and respondents have made a nonsensical leap from the premise that the HCQIA immunity applies to discrete decisions to the "conclusion" that it immunizes *everything,* so long as an eventual fair hearing is offered. Repondents' position that the eventual final hearing immunizes everything that goes before is also inconsistent with respondents' attempt to make intermediate decisions independently operative to trigger the running of the statute of limitations.

Respondents assert, without analysis, that the current decision is not inconsistent with *Austin v. McNamara,* 979 F.2d 728 (9th Cir. 1992.) It is patently clear, however, that such conflict exists. Under *Austin,* the HCQIA standards would apply to the first two JRC hearings, which were admittedly defective. The respondents would not be immunized for the consequences of — damages caused by — *those particular hearings.*

CONCLUSION

For the reasons herein stated, this Petition for Writ of Certiorari should be granted. The bench and bar nationwide urgently need an interpretation by this court of the Health Care Quality Improvement Act standards. Respondents have complained about the lack of "authority" — presumably referring to cases — cited by petitioner in his argument addressing the Ninth Circuit's adoption of the "standard" of "possible harm." One of the reasons it is important for this Court to grant certiorari is the very paucity of cases addressing that issue, and other aspects of the HCQIA. Physicians, such as Dr. Fobbs, are entitled to have this Court speak concerning the extent to which physicians' hospital privileges will be protected by a right of due process.

Respectfully submitted,

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